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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE HARVEY,

Defendant and Appellant.

H037007

H037817

(Monterey County
Super. Ct. No. SS101503)

Defendant Robert Lee Harvey sold cocaine base to an undercover police officer in June 2010. He was on both probation and parole at the time and had a 40-year history of narcotics and property offenses, during which period he had been in and out of jail and prison. Defendant pleaded guilty to sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and admitted allegations that he had suffered a prior narcotics conviction (Health & Saf. Code, § 11370.2, subd. (a)) and two strike priors (Pen. Code, § 1170.12), and that he had served prison terms for four prior felony convictions (Pen. Code, § 667.5, subd. (b)). His plea and admissions were entered pursuant to a plea agreement under which he would receive a specified sentence of six years in prison.

At the April 2011 sentencing hearing, the court struck the strike priors and prison priors, and it imposed the agreed six-year term. The court also ordered defendant to pay a \$200 “Lab Fee: per HS 11372.5(a)” and a \$200 “Drug Program Fee per HS 11372.7(a)” The abstract of judgment stated that defendant was obligated to pay

these fines “plus any applicable penalty assessments.” The court awarded defendant 304 days of actual custody credit and 152 days of conduct credit against his prison term. Defendant timely appealed from the judgment.

In November 2011, defendant filed a motion seeking additional conduct credit under the version of Penal Code section 4019 that had taken effect on October 1, 2011. The motion was denied. Defendant timely appealed from the order denying his motion and obtained a certificate of probable cause.

Defendant’s first contention in the appeal from the judgment, and his only contention in the appeal from the denial of his motion, is that the court should have granted him additional conduct credit under the revised version of Penal Code section 4019 that took effect in October 2011. He claims that the distinction drawn in this statute between those who committed their crimes before October 1, 2011, and those who committed their crimes on or after October 1, 2011, violates his right to equal protection. The equal protection claim that underlies his contention was rejected by the California Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). Although *Brown* concerned a previous version of Penal Code section 4019, its holding is fully applicable to defendant’s claim. The California Supreme Court held in *Brown* that prospective only application of the new version of the statute did not violate equal protection because the purpose of the statute was to create an incentive for good behavior, which could not be done retroactively. (*Brown*, at pp. 328-330.) “[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Brown*, at pp. 328-329.) The same is true here, as the California Supreme Court recognized in *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*), which concerned the very same version of Penal Code section 4019 that defendant seeks the benefit of. (*Lara*, at p. 906, fn. 9.)

Based on *Brown* and *Lara*, we therefore reject defendant's claim that he is entitled to additional conduct credit.

In his appeal from the judgment, defendant claims that the trial court erred in imposing a Health and Safety Code section 11372.7 drug program fee because the record lacks any evidence that he has the ability to pay such a fee. A trial court is required to find that a defendant has the ability to pay a drug program fee before imposing one. (Health & Saf. Code, § 11372.7, subd. (b).) The only evidence in the record regarding defendant's ability to pay this fee reflects that he lacks such an ability. The probation report noted that defendant is in poor health and has been unemployed for more than five years. The probation report described his "FINANCIAL CAPABILITY" thusly: "The defendant does not appear to be able bodied; he suffers from high blood pressure and has several health related issues, and it is anticipated *he will have difficulty paying any fines and fees imposed by the Court.*" (Italics added.) The court imposed numerous fines and fees including a \$1,200 restitution fund fine, a \$40 court security fee, a \$30 court facilities assessment fee, and a lab fee. The court was required to take into account these other fees and fines in determining defendant's ability to pay the drug program fee. On this record, there simply was no evidence that defendant, in poor health, not "able bodied," not recently employed, and subject to other fines and fees totaling more than \$1,270, had the ability to pay this additional fee. The appropriate disposition is to strike this fee.

Defendant's final contention in his appeal from the judgment is that the trial court's order that he pay a \$200 lab fee is erroneous because the statute authorizes only a \$50 fee. He is correct. (Health & Saf. Code, § 11372.5, subd. (a).) The Attorney General concedes that the statute authorizes only a \$50 fee, but she maintains that an additional amount is attributable to a penalty assessment. She asks us to direct the trial court to correct the abstract of judgment to delineate the penalty assessment attached to this fee. Defendant agrees that this is the appropriate remedy, and we agree. Trial courts

are required to identify the statutory basis for all fees, fines, and penalties imposed.
(*People v. Eddards* (2008) 162 Cal.App.4th 712, 718.)

The order denying defendant's motion is affirmed. The judgment is reversed and remanded with directions to (1) strike the drug program fee, and (2) amend the abstract of judgment to reflect that the lab fee is \$50 and delineate the statutory basis for any penalty assessment to which it is subject. The trial court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Marquez, J.